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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-792

GAFTON I. CIURUS, *et al.*,
Petitioners,

vs.

JACK NEW, TREASURER OF THE
STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Jack New, Treasurer of the State of Indiana, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause number 74-1251 on October 3, 1974.

OPINION BELOW

The opinion of the Seventh Circuit was rendered in an order that, pursuant to Circuit Rule 28 of the Seventh Circuit, was not to be published. That opinion has been

appended hereto as Appendix A. The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, cause number 73 L 33, was issued on January 25, 1974, and is unreported. That decision is appended hereto as Appendix B.

JURISDICTION

Petitioners allege jurisdiction in this Court pursuant to 28 U.S.C. § 1254(1). However, Petitioners have not shown this Court which of the applicable paragraphs of Rule 19 of the Rules of this Court apply to the Petition for Writ of Certiorari (hereafter Petition).

The Respondent would assert that there is no jurisdiction in this Court to issue the writ prayed for since there is no federal question involved, no decision issued in conflict with applicable decisions of this Court or any decision in conflict with decisions of other circuits. In fact, the issues involved herein have been entirely foreclosed by this Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

QUESTIONS PRESENTED FOR REVIEW

The Respondent would assert that the sole issue presented to this Court is:

1. Whether the Seventh Circuit erred in holding that the Petitioners/Plaintiffs remedy was in the Indiana Courts?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Fourteenth Amendment to the Constitution of the United States provides in section 1:

> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Trial Rule 59 of the Indiana Rules of Trial Procedure provides, in part:

> (A) The Court upon its own motion or the motion of any of the parties for or against all of the parties and upon all or part of the issues shall enter an order for the correction of errors occurring prior to the filing thereof, ...
>
> (C) A motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment ...
>
> (G) In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion. Issues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court. A motion to correct errors shall not be required in the case of appeals from interlocutory orders, orders

appointing or refusing to appoint a receiver, and from orders in proceedings supplemental to execution.

STATEMENT OF THE CASE

I.

Nature of the Case

This Petition, filed by Petitioners (Plaintiffs below) who are citizens and residents of Romania, arises from a case where the Plaintiffs sought to have the District Court determine that they were the rightful heirs to the property of one Thomas Ciurus, deceased. The Plaintiffs alleged in the District Court that they had been denied their property by the Circuit Court of Jasper County, Indiana without due process of law as provided by the Fourteenth Amendment to the Constitution of the United States, since the property of Thomas Ciurus, deceased, had escheated to the State of Indiana.

II.

Course of Proceedings Below

Petitioners filed their Complaint in the District Court on September 21, 1973, alleging jurisdiction in that Court pursuant to 28 U.S.C. §§ 1331(a) and 1332(a)(2).

On October 12, 1973, the Defendant below (Respondent herein), filed a Motion to Dismiss with a supporting Memorandum, asserting that the District Court lacked subject matter jurisdiction and the Complaint failed to state a claim upon which relief could be granted.

Also on October 12, 1973, the Plaintiffs filed a Motion for Summary Judgment with counsel's supporting affidavit stating that certain documents attached and others

referred to in the Complaint were true and correct copies of the original documents. Plaintiffs also filed a "Trial Brief."

On or about October 22, 1973, Plaintiffs mailed their "Brief in Opposition to Motion to Dismiss" to the Court, to which the Defendant filed a Reply on November 5, 1973.

On November 21, 1973, Defendant filed his "Response to Plaintiffs' Motion for Summary Judgment" and "Motion for Summary Judgment."

The District Court issued its "Memorandum of Decision and Order" on January 25, 1974, dismissing Plaintiffs' Complaint for failure to state a claim upon which relief could be granted since Plaintiffs, as foreign citizens not residing in the United States, were not persons within the meaning of the Fourteenth Amendment, and since the Plaintiffs had been fully accorded "due process" in the state courts. See page A-7 of Appendix B.

On or about February 19, 1974, Plaintiffs filed their "Notice of Appeal" to the Seventh Circuit. In that Court the Plaintiffs asserted two issues:

1. Are the plaintiffs, as non-resident aliens, entitled to the protection of the Fourteenth Amendment to the Constitution of the United States?

2. If the answer to question number one is in the affirmative, is the State court's judgment of escheat contrary to the Fourteenth Amendment rights of the plaintiffs?

The Seventh Circuit heard oral argument on September 16, 1974, and issued its opinion on October 3, 1974, holding that since no appeal was taken from two Indiana state court proceedings involving the issues raised therein by

Petitioners, the action was barred by the doctrine of *res judicata*. The Court then noted that federal district courts are not to exercise appellate jurisdiction over state courts, and that Plaintiffs' remedy was therefore in the Indiana Courts. See pages A-2 and A-3 of Appendix A.

III.

Facts Relevant to Issues Presented for Review

The estate of Thomas Ciurus, deceased, was administered in the Jasper County Circuit Court, captioned "In the Matter of the Estate of Thomas Ciurus, deceased by Paul Cutean, Administrator," cause number 4479. Plaintiffs submitted certain documents to that Court apparently designed to show that they were the heirs of the decedent. On November 22, 1971, that Court ruled against the plaintiffs. On January 17, 1972, the Jasper Circuit Court entered a final decree in that estate stating that all property was to go to the State of Indiana. No motion to correct errors, pursuant to TR. 59 of the Indiana Rules of Trial Procedure, was filed.

Thereafter on May 11, 1973, various petitions were filed with the Jasper Circuit Court seeking to have the money previously ordered paid to the State of Indiana now paid to the plaintiffs. The plaintiffs were specifically mentioned in the petitions as purported heirs.

A hearing was held on the petitions on June 25, 1973, and on July 24, 1973, the Jasper Circuit Court entered its "Memorandum Decision and Order Denying Petition." A Motion to Correct Errors under TR. 59 of the Indiana Rules of Trial Procedure was never filed by the plaintiffs as a result of the denial of the petitions, and consequently no appeal was taken. Instead, plaintiffs filed their Complaint in the District Court on September 21, 1973, or three

(3) days prior to the expiration of the sixty (60) day period allowed for filing a Motion to Correct Errors.

Thus, the issue that plaintiffs sought to have the District Court consider had been litigated in the Jasper Circuit Court adversely to plaintiffs and no appeal was taken. That judgment was therefore *res judicata* to the District Court.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT DID NOT ERR IN HOLDING THAT PETITIONERS' REMEDY WAS IN THE INDIANA STATE COURTS

Petitioners assert on page 11 of their Petition that:

> "The lower courts, in effect, have determined that the rights asserted in the complaint by foreign nationals are not proper subject for adjudication by a Federal Court, and that the exercise of Federal jurisdiction must be declined *because the rights should have been litigated in the state court . . .*" (Emphasis Supplied)

This is not an accurate statement of the holdings of either the District Court or the Seventh Circuit since those rights were fully litigated in the state court.

In its Decision of January 25, 1974, the District Court stated:

> "The only cause of action asserted by plaintiffs is that their due process rights under the Fourteenth Amendment have been violated. The relevant part of the Fourteenth Amendment provides that:
>
> > . . . nor shall any State deprive *any person* of life, liberty or property, without due process of law.... (emphasis added).

> The question presented to this court is whether the words "any person" grant due process rights to citizens of foreign nations not residing in the United States. This court concludes that plaintiffs cannot assert Fourteenth Amendment rights since the words "any person" apply to citizens of the United States and aliens residing in the United States. *Graham v. Richardson,* 403 U.S. 365, 371, 9 S.Ct. 1848, 1951 (1971); *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886); *Cermeno-Cerna v. Farrell,* 291 F. Supp. 521 (C. D. Cal. 1968). See also 3 Am. Jur. 2d *Aliens and Citizens* § 8 (1962); 16 Am. Jur. 2d *Constitutional Law* § 558 (1964) ...
>
> In addition, it is quite clear that plaintiffs were accorded due process in the state action. Their attorney was notified of the hearing to determine heirship. He had been told that the State must be kept informed because it had a possible escheat claim. As an attorney he must have been aware that if no heirs were found, the property would escheat to the State. Knowing all this, he chose not to attend the hearing. When the court ruled adversely to his clients, he chose not to file a Motion to Correct Errors pursuant to Indiana Trial Rule 59 or to take an appeal. In light of the above facts, plaintiffs cannot be heard to say that they had no reason to believe that a claim for escheat would be made or that they were not afforded an opportunity to appear and protect their rights. If the Jasper Circuit Court erred, the proper remedy was an appeal within the state court system and not a suit in this court."

As stated by the District Court, the Petitioners have in fact received due process in this matter. They were aware that the estate was open for administration, and they retained counsel to represent them. In that regard counsel filed some documents, apparently designed to prove heirship in the Petitioners.

On page seven of their Petition the Petitioners acknowledge that the administrator of the estate petitioned the Jasper Circuit Court for a determination of the heirs of the decedent, and a hearing was set on that petition. This obviously was an important stage of proceedings in that case, yet their counsel chose not to attend that hearing.

The Petitioners admit that they had notice of the hearing on the petition to determine heirs, but attempt to argue that they did not know an escheat would take place, and that therefore, they were denied due process. Obviously, the two possible decisions that the Court could have made regarding heirship were that the decedent either died with heirs or without heirs, and the purpose of the hearing was to assist the Court in that decision. If the decedent died without heirs, then, as counsel for Petitioners surely will admit, an escheat to the state would take place.

Thus, in realty, Petitioners are arguing simply that the Jasper Circuit Court found that they were not to be declared the heirs of the decedent, and even though they chose not to attend the hearing for that determination, that determination constituted a denial of due process. The Respondent would submit that this is an untenable position.

In addition, Petitioners had a complete and actual remedy in the Indiana State courts, but did not avail themselves of that remedy. They did not file a Motion to Correct Errors as required by TR. 59 of the Indiana Rules of Trial Procedure after the Jasper Circuit Court issued its final decree on January 17, 1972. Thereafter, on May 11, 1973, or some sixteen (16) months later, certain petitions were filed to have the money previously paid to the State now paid to the Petitioners. When those petitions were denied on July 24, 1973, Petitioners again did not

file a motion to Correct Errors within the sixty (60) day time limit.

Instead of filing their motion to correct errors after the decision of the Jasper Circuit Court, the Petitioners filed the action in the District Court. Thus, the Decision of the Jasper Circuit Court is a final, uncontested decision and was binding on the District Court as *res judicata.* In the District Court action the parties were the same, the subject matter was the same and the issues were the same as in the state court. Since the matter has been determined by a Court of competent jurisdiction, the matter is *res judicata.* See *Linville v. Chenoweth,* (Ind.App., 1949) 84 N.E. 2d 473; *Brown v. Briggs,* 292 P. 2d 385 (1956); *Viles v. Prudential Ins. Co. of America,* (C.C.A. Colo., 1941) 124 F. 2d 78. Cert. denied 315 U.S. 816.

In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), this Court said at pages 415 and 416:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; and that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. *Elliott v. Piersol,* 1 Pet. 328, 340; *Thompson v. Tolmie,* 2 Pet. 157, 169; *Voorhees v. Bank of United States,* 10 Pet. 449, 474; *Cornett v. Williams,* 20 Wall.

> 226, 249; *Ex parte Harding,* 120 U.S. 782. Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, § 237, as amended September 6, 1916, c. 448, § 2, 39 Stat. 726. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, § 24. Besides, the period within which a proceeding might be begun for the correction of errors such as charged in the bill had expired before it was filed, Act September 6, 1916, c. 448 § 6, 39 Stat. 726, and, as is pointed out in *Voorhees v. Bank of United States, supra,* after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly."

The Respondent would assert that the issues involved herein have been entirely foreclosed by the *Rooker* case. Thus, Petitioners argument on page 13 of the Petition that:

> ". . . The question here, however, is not one of probate, but is to determine the right to property in the possession of the State of Indiana . . ."

attempts to draw a distinction that cannot be made. The question here is precisely one of probate. The Petitioners have been challenging, through three courts, the authority of the Jasper Circuit Court to determine heirs to an estate, and their failure to pursue their alleged claim through the Indiana courts does not give rise to a case in the federal courts alleging a denial of due process of law pursuant to the Fourteenth Amendment to the Constitution of the United States. As this Court has consistently recognized, the federal judiciary must generally assume:

> ". . . that state courts . . . will observe constitutional limitations as expounded by this Court, and that the

> mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski v. Pfister*, 380 U.S. 479, 484-485 (1965).

See also *Rooker v. Fidelity Trust Co., supra*, at 415.

A further reason why Petitioners should have pursued their alleged claim in the state courts is the Eleventh Amendment to the Constitution of the United States which bars jurisdiction of this matter in the federal judiciary. The Respondent asserted his Eleventh Amendment defense in both Courts below, and would reassert that position here.

This suit in the District Court was brought by citizens and residents of a foreign state, Romania, against a nominal state defendant to compel the State of Indiana to pay money to the plaintiffs. Such an action is a classic example for the Eleventh Amendment bar. See generally *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945); *Edelman v. Jordan*, 94 S. Ct. 1347, 1356 (1974).

In addition to the jurisdictional bar of the Eleventh Amendment, the Petition herein should also be denied since Petitioners have failed to advance any question that is reviewable by this Court. Rule 19(b) of the Rules of this Court lists the decisions of a court of appeals that are reviewable by a petition for writ of certiorari, and the alleged issues herein fail to comply with the issues advanced in that rule.

CONCLUSION

For these reasons, the Petition for a writ of certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 28

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Argued September 16, 1974
October 3, 1974

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

GAFTON I. CIURUS, et al.,
Appellants,

No. 74-1251

vs.

JACK NEW, Treasurer,
State of Indiana
Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division at Lafayette.
Civ. No. 73 L 33
Jesse E. Eschbach, Judge

ORDER

Plaintiffs are citizens and residents of Romania and claim to be the heirs of Thomas Ciurus, who died on September 28, 1970, as a resident of Jasper County, Indiana. Plaintiffs authorized a Cleveland, Ohio, lawyer to represent them with respect to the Ciurus estate. On November 22, 1971, the petition to determine heirship came on for a hearing. Plaintiffs' counsel had notice of the hearing but did not appear. On that date, a judge of the Jasper Circuit Court found that there was insufficient proof as to the heirs of the deceased and therefore held that the property escheated to the State of Indiana. A final decree

to that effect was entered on January 17, 1972. On July 24, 1973, the same court denied a petition of the State Bank of Remington, Indiana, seeking to require the Treasurer of the State of Indiana to pay the escheated monies to the bank as receiver for the deceased's Romanian heirs. The Treasurer of the State of Indiana was a respondent to the petition for a receiver and was represented by deputy attorneys general of the State of Indiana. The present complaint was filed on September 21, 1973, almost sixty days after the denial of the receiver's petition.

The district court granted the defendant's motion to dismiss on three grounds:

1. Plaintiffs cannot assert that their due process rights were violated in the Indiana proceedings because the Fourteenth Amendment applies only to citizens of the United States and aliens residing therein.

2. Plaintiffs were accorded due process in the state proceedings.

3. If the Jasper Circuit Court erred, the proper remedy was an appeal within the state court system.

Plaintiffs and the defendant treasurer were parties in the Indiana litigation. Since plaintiffs failed to assert their due process rights in the Jasper County Circuit Court in the almost two months between receipt of notice of the preliminary order of escheat and the reaffirmance of that order and since no appeal was taken from either of the state court decrees, we hold that the plaintiffs' action below is barred by the doctrine of *res judicata*. As the Second Circuit noted recently in a somewhat similar case, *Lovely v. Laliberte*, 498 F.2d 1261, 1263 (2d Cir. 1974), "[R]es judicata, [even in the context of constitutional claims], bars all grounds that might have been, but were not, presented to the state court." Furthermore, the Supreme

Court, in *Rooker v. Fidelity Trust Company*, 263 U.S. 413, indicated that federal district courts are not to exercise state appellate jurisdiction. Plaintiffs' remedy was in the Indiana courts.

Judgment affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

FILED Jan. 25, 1974 at ———— M
Francis T. Grandys, Clerk

GAFTON I. CIURUS, ET AL., *Plaintiffs,*	)	
v.	)	CIVIL NO. 73 L 33
JACK NEW, Treasurer of the State of Indiana, Indianapolis, Indiana, *Defendant.*	)	

MEMORANDUM OF DECISION AND ORDER

This cause is before the court on plaintiffs' motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and defendant's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and motion to dismiss pursuant to Rule 12, Fed. R. Civ. P. Since this court has determined that the defendant's motion to dismiss will be granted, no decision will be reached on the motions for summary judgment.

The facts, as alleged in the complaint, are as follows. Plaintiffs are citizens and residents of Romania. Plaintiffs claim to be the heirs of Thomas Ciurus, who died in 1970, a resident of Jasper County, Indiana. Plaintiffs executed a power of attorney whereby they authorized John R.

Vintilla, an attorney, to represent them and act on their behalf in regard to their rights and interests in the estate of Thomas Ciurus. On November 22, 1971, a hearing was held before the Jasper Circuit Court on a petition to determine heirship filed by the administrator of the state of Thomas Ciurus. Although plaintiffs' attorney did not appear, the court had before it documentation regarding the heirship of these plaintiffs. These documents had been provided by plaintiffs' counsel and were presented to the court by Thomas G. Fisher, attorney for the administrator. The court decided that the documents were not sufficient proof of heirship and ordered that the property of Thomas Ciurus be distributed to the State of Indiana.

The instant action was filed on September 12, 1973, basing jurisdiction on 28 U.S.C.A. §§ 1331(a) and 1332(a)(2). The complaint alleged that the "judgment" of the Jasper Circuit Court deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. Plaintiffs' attorney had been advised by the attorney for the administrator, Thomas G. Fisher, that he (Fisher) personally saw no problem with regard to determining heirship of the plaintiffs as long as such heirship was substantiated. Fisher also informed plaintiffs' attorney that it had formerly appeared that the State of Indiana would take the estate by escheat but that no longer appeared to be the case. Yet Fisher counseled keeping the State advised of developments nevertheless. Plaintiffs' attorney states that because of the above representations of Fisher and because the documents regarding heirship were before the court, he did not believe it was imperative to appear at the hearing to determine heirship. He claims that plaintiffs had no notice or reason to believe that a claim for escheat would be made. Therefore, it is alleged that plaintiffs were afforded no opportunity to appear

and protect their rights against such a claim. As a result, plaintiffs allege that they were deprived of their inheritance from the estate of Thomas Ciurus and that this deprivation violated their Fourteenth Amendment rights. On October 12, 1973, plaintiffs moved for a summary judgment on the ground that no issue of material fact existed and that plaintiffs had been denied due process as a matter of law.

On the same day, defendant moved to dismiss the action, stating that the court lacked subject matter jurisdiction, that plaintiffs failed to state a claim upon which relief can be granted, that the Eleventh Amendment prohibited suits of this nature, and that the court should abstain from hearing a case of this nature. On November 21, 1973, defendant moved for summary judgment, asserting that the decision in the Jasper Circuit Court, from which no appeal was taken, was a bar to the instant action.

The only cause of action asserted by plaintiffs is that their due process rights under the Fourteenth Amendment have been violated. The relevant part of the Fourteenth Amendment provides that:

> . . . nor shall any State deprive *any person* of life, liberty or property, without due process of law. . . . (emphasis added)

The question presented to this court is whether the words "any person" grant due process rights to citizens of foreign nations not residing in the United States. This court concludes that plaintiffs cannot assert Fourteenth Amendment rights since the words "any person" apply only to citizens of the United States and aliens residing in the United States. *Graham v. Richardson*, 403 U.S. 365, 371, 91 S.Ct. 1848, 1951 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886); *Cermeno-Cerna v. Farrell*, 291

F. Supp. 521 (C.D.Cal. 1968). See also 3 Am. Jur.2d *Aliens and Citizens* § 8 (1962); 16 Am.Jur.2d *Constitutional Law* § 558 (1964). Since plaintiffs cannot assert Fourteenth Amendment rights, they have failed to state a claim upon which relief can be given and the complaint must be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.[1]

In addition, it is quite clear that plaintiffs were accorded due process in the state action. Their attorney was notified of the hearing to determine heirship. He had been told that the State must be kept informed because it had a possible escheat claim. As an attorney he must have been aware that if no heirs were found, the property would escheat to the State. Knowing all this, he chose not to attend the hearing. When the court ruled adversely to his clients, he chose not to file a Motion to Correct Errors pursuant to Indiana Trial Rule 59 or to take an appeal. In light of the above facts, plaintiffs cannot be heard to say that they had no reason to believe that a claim for escheat would be made or that they were not afforded an opportunity to appear and protect their rights. If the Jasper Circuit Court erred, the proper remedy was an

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[1] The court has taken note of the Protocol to the Consular Convention Between the United States of America and the Socialist Republic of Romania attached to plaintiffs' brief in opposition to the motion to dismiss. However, the Protocol does not in any way alter the court's decision to dismiss the action. The decedent died in September 1970 and the decision of the Jasper Circuit Court which is challenged in the instant action was entered in November 1972. The Consular Convention did not enter into force until July 1973, well after the decedent's death and subsequent to the state court decision and does not apply to the instant action.

Since this action was brought solely under the Fourteenth Amendment, this court expresses no opinion as to whether plaintiffs have a viable cause of action under any international agreement between the United States and Romania.

appeal within the state court system and not a suit in this court.

For the above reasons defendant's motion to dismiss is granted. No decision is reached on plaintiffs' motion for summary judgment or defendant's motion for summary judgment. This cause is now dismissed.

Entered this 25th day of January, 1974.

/s/ JESSE E. ESCHBACH

United States Dristrict Judge